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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1982

JIM MCNEFF, INC., a California Corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

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Questions Presented.

1. Whether a § 8(f) agreement is judicially enforceable for the term of the agreement accruing before the majority status of the union has been established under § 9 of the Act?

2. Whether alleged union coercion in obtaining a § 8(f) agreement is conduct arguably prohibited or protected under § 8 of the Act and, therefore, subject to the primary jurisdiction of the NLRB?

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FRANK L. TODD, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS.

Respondents Frank L. Todd, *et al.*, ("Trustees") pray the decision issued on February 8, 1982, by the U. S. Court of Appeals for the Ninth Circuit be affirmed. The decision of the Court of Appeals is officially reported at 667 F.2d 880. This Court granted the petition for a writ of *certiorari* on July 2, 1982, as reported at .... U.S. ...., 102 S.Ct. 3508.

STATUTES INVOLVED.

The statutes involved in this case are:

A. § 8(f) of the National Labor Relations Act, 73 Stat. 545, 29 U.S.C.A. § 158(f);

B. § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a);

C. § 302(c)(5) of the Labor Management Relations Act of 1947, 61 Stat. 157-158, 29 U.S.C.A. § 186(c)(5); and

D. § 515 of the Employee Retirement Income Security Act of 1974, as added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295, 29 U.S.C.A. § 1145.

The text of each statute is set forth in the Appendix, *infra*.

STATEMENT OF THE CASE.

Jim McNeff, Inc. ("McNeff") signed a collective bargaining agreement ("Agreement") with the International Union of Operating Engineers, Local Union No. 12 ("Local 12") on September 13, 1978, after being told by a superintendent of the general contractor on a construction project, in the presence of a representative of Local 12, that McNeff would be required to sign the Agreement in order to continue performing work as a subcontractor on the project. (J.A. 40.)[1] After signing the Agreement, the President of McNeff informed all three employees that the Agreement would require the employees to join Local 12 as a condition of continued employment. All three employees signed documents necessary to join Local 12 and were dispatched by Local 12 as employees covered by the Agreement. (J.A. 40.)

The Agreement (J.A. 9-11) incorporated by reference the terms of the Master Labor Agreement negotiated between Local 12 and the Southern California General Contractors Associations for July 1, 1977, to June 15, 1980. The Master Labor Agreement contains a union security clause requiring employees covered by the agreement to become members of Local 12 within eight days of the start of their employment

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[1] "J.A." references are to the Joint Appendix, followed by page number of relevant material. "Ex.R." references are to the Excerpt of Record filed in the Court of Appeals, followed by page number.

"R.T." references are to the Reporter's Transcript of proceedings in the district court, followed by page and line of relevant discussion.

or the effective date of the agreement, whichever is later. (J.A. 38.) The Master Labor Agreement also contains a union signatory subcontracting clause prohibiting the subcontracting of work to be performed at the construction site, except to a subcontractor signatory to a labor agreement with Local 12. (J.A. 39.)

The Agreement obligated McNeff to report all hours of employment and pay contributions at specified hourly rates to the Operating Engineers Health & Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (the "Trusts") on behalf of each employee covered by the Agreement. (Ex.R. 155.) From the signing of the Agreement until March, 1979, McNeff, Inc. filed monthly report forms furnished by the Trusts, but falsely reported that "no members of this craft were employed during the month." (Ex.R. 49-54.)

On November 30, 1978, the Trusts sent a letter requesting access to the payroll records of McNeff for the purpose of performing an audit. (Ex.R. 153.) When McNeff postponed and eventually refused to permit the audit (J.A. 36), the Trustees filed a complaint in this action on April 26, 1979. (J.A. 3.) The Trustees obtained access to the required payroll records through pretrial discovery proceedings in this action. (J.A. 28.) When performed on June 1, 1979, the payroll audit covered the interval from the signing of the Agreement on September 13, 1978, through April 30, 1979. (J.A. 30.) The amount of fringe benefit contributions, liquidated damages for late payment, and audit expense found to be due under the Agreement for that interval was $5,316.79. (J.A. 31.)

A motion for summary judgment was filed on behalf of the Trusts seeking recovery of the amount shown to be due by the audit. McNeff sought to avoid the summary judgment

by arguing that the Agreement was unenforceable for two reasons: (1) the Trusts had not proved that Local 12 had achieved a majority status among covered employees; and (2) the Agreement was signed by McNeff under coercion by Local 12. To support its arguments, McNeff showed the district court that the General Counsel of the National Labor Relations Board ("NLRB" or "Board") had declined to issue a complaint against McNeff based on a refusal to bargain charge filed by Local 12 under Section 8(a)(5) of the National Labor Relations Act ("Act"). (R.T. 4-5.) In addition, the record shows that McNeff had filed a petition for a union representation election with the NLRB, but that the election results had not been certified at the time of hearing on summary judgment. (R.T. 18.)

On February 11, 1980, the district court entered summary judgment for the Trusts in the full amount shown to be due by the payroll audit covering the interval from September 13, 1978, through April 30, 1979, plus attorneys' fees. (Ex.R. 222-223; Pet.App., pp. 10-11.) McNeff filed a timely notice of appeal. While the appeal was pending, the NLRB issued on November 17, 1980, a certification of results of election pursuant to McNeff's petition establishing that Local 12 did not receive a majority of votes cast in the election. (Pet.App., pp. 34-35.)

On McNeff's appeal, the Court of Appeals held that the Agreement signed by McNeff and Local 12 pursuant to § 8(f) of the Act is judicially enforceable as a contract obligation until an effective repudiation of the Agreement. (Pet.App., p. 7.) The Court of Appeals further held that the conduct of McNeff "enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations" did not constitute an effective repudiation. (Pet.App., p. 8.) The Court of Appeals observed that the majority status of Local 12

would become relevant only if an effective repudiation had occurred, and then would be relevant only insofar as prior attainment of majority status would bar a subsequent repudiation. (Pet.App., pp. 6-7.) The Court of Appeals held further that a defense of alleged coercion in the signing of a § 8(f) agreement cannot be raised as a defense in a § 301 suit. (Pet.App., pp. 8-9.)

SUMMARY OF THE ARGUMENT.

This case presents for decision whether an agreement made pursuant to § 8(f) of the Act is enforceable in a § 301 suit before the union attains majority status among employees covered by the agreement. The case also requires the Court to decide whether an employer may avoid its contract obligations under a § 8(f) agreement by conduct other than filing a § 9 election petition, and to clarify the effect of such events on judicial enforcement of the agreement.

The Court of Appeals correctly granted enforcement of the Agreement between McNeff and Local 12 from the signing of the Agreement on September 13, 1978, through the end of the period covered by the payroll audit on April 30, 1979. McNeff signed the Agreement in order to remain eligible for work on a construction site, then enjoyed the benefits of the Agreement while complying with its terms in certain respects and breaching its terms in other respects. The Court of Appeals further held correctly that alleged coercion to obtain the signing of the Agreement could not be presented as an affirmative defense to enforcement of the Agreement in a § 301 action.

The holdings of the Court of Appeals are supported by the provisions and policies of the Act, particularly § 8(f), and §§ 301 and 302(c)(5) of the Labor Management Re-

lations Act ("LMRA"). The statutory design is intended to function as follows:

> A union and an employer in the construction industry may voluntarily enter into an agreement pursuant to § 8(f), and the agreement will be judicially enforceable as any other contract in an action under § 301. However, the employer may raise a defense that the NLRB has issued a certification of election results under § 9 of the Act establishing that the union does not have majority status among employees covered by the agreement. Rights accruing under the agreement prior to the date of the Board's certification are judicially enforceable; terms of employment occurring after that date may be set free of the agreement. The administration of construction industry employee representation issues arising under the Act is retained in the regular channels of the Board as the authorized expert administrative agency, rather than placing such issues in the already crowded litigation arena of federal and state courts.

The Agreement between Local 12 and McNeff is a valid contract on its face, and would ordinarily be enforceable unless in violation of a federal statute. When interpreting any statute, the language of the statute is conclusive in the absence of a clearly expressed legislative intention to the contrary. *Consumer Product, etc. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The express language of § 8(f) states that "[i]t shall not be an unfair labor practice . . . to make an agreement . . .", and says nothing specifically authorizing either party to "repudiate" or otherwise avoid the promised performance under such an agreement. However, the last *proviso* of § 8(f) states that any such agreement "shall not be a bar to a petition filed under § 9(c) or 9(e)" of the Act. 29 U.S.C. § 158(f). Thus, the only avenue within the language of § 8(f) for calling into question the continued effectiveness

of the agreement is contained in the context of a petition for a representation election filed with the NLRB by the employees, the union or the employer.

The history of § 8(f) does not show "a clearly expressed legislative intention" that employers be able to avoid their agreements by means other than filing a § 9 petition. To the contrary, the legislative history actually shows a clear intent that agreements authorized by § 8(f) be binding contractual commitments of the parties, because "it is necessary for the employer to know his labor costs" before preparing bids for construction contracts, and "the employer must be able to have available a supply of skilled craftsmen ready for quick referral." *NLRB v. Local Union No. 103, Iron Workers* ("*Iron Workers*"), 434 U.S. 335, 348, 98 S.Ct. 651, 659 (1978). The legislative history further shows that Congress authorized prehire agreements to establish terms of employment in advance because experience showed that representation elections were not feasible under the working conditions of the construction industry. *Id.*, 434 U.S. 349, 98 S.Ct. at 659. Congress intended to tailor the Act to accommodate the practical environment faced by construction trade unions in organizing workers and stabilizing employment conditions.

The *Iron Workers* decision of this Court does not support adding court-made avenues to the express statutory provision by which an employer may avoid performance under a § 8(f) agreement. The *Iron Workers* decision held that the existence of a § 8(f) agreement does not enable a union to picket an employer free of the statutory limitations of § 8(b)(7)(C). Likewise, in this case an employer should not be permitted to avoid its agreement entered into pursuant to § 8(f), except according to the express *proviso* of § 8(f) authorizing the filing of an election petition. In characterizing a § 8(f) agreement as "voidable" in *Iron Workers*,

434 U.S. at 341, 98 S.Ct. at 655-56, this Court acknowledged only the rights under § 8(f) of the employees, the employer and the union to petition for an election under § 9 of the Act as the appropriate avenues for avoiding the agreement. *Id.*, 434 U.S. at 345, 349, 98 S.Ct. at 657, 659.

The views expressed in *Higdon* that union majority status might be subject to litigation as a defense in a § 301 suit did not purport to decide the issue, and were expressed to counter the union's argument that having judicially enforceable § 8(f) agreement precludes applying the limits of § 8(b)(7)(C) to the union's picketing. The reverse argument now made by the employer, *i.e.*, that the application of § 8(b)(7)(C) to restrict union picketing as set forth in *Higdon* precludes treating the § 8(f) agreement as judicially enforceable, is equally fallacious and likewise should be rejected.

The intent of Congress that the decision of an employer *to enter into* a § 8(f) agreement should be voluntary does not imply that the employer's decision to agree should be free of all economic considerations. Neither does voluntariness in *entering into* the agreement imply that the promise to perform is to be at all times "at will" and subject to immediate repudiation, either by simple breach or by explicit notification. The fundamental policy of the Act to promote labor peace and stability, the policy of § 301 that agreements made in the context of collective bargaining should be enforceable according to the terms and intent of the parties, the policy of § 302(c)(5) that an employer's obligation to pay to employee trusts should be in writing and reliable, and the objective of § 515 of ERISA that judicial enforcement of employee benefit contributions be simple and inexpensive, run directly contrary to such an interpretation of § 8(f).

If a union's coercive conduct in obtaining a prehire agreement were to deprive the agreement of the protection of § 8(f), then by the express language of the statute ("It shall not be an unfair labor practice . . .") the union's conduct would be subject to the prohibition or protection of § 8(a) and (b) of the Act. Regulation of such conduct is within the primary jurisdiction of the NLRB and outside the § 301 jurisdiction of the courts. Therefore, McNeff's allegation of coercive conduct by Local 12, while factually unsupported in the record, is not a valid defense in a § 301 suit.

ARGUMENT.

I.

AN AGREEMENT PERMITTED BY § 8(f) IS JUDICIALLY ENFORCEABLE FOR THE FULL TERM ACCRUING PRIOR TO THE DATE THE NLRB CERTIFIES ELECTION RESULTS ESTABLISHING LACK OF UNION MAJORITY STATUS.

A. The Express Language of § 8(f) Provides Only for the Filing of a § 9 Petition as a Means of Avoiding the Terms of Agreement.

Although the Agreement between McNeff and Local 12 is a valid contract on its face, signing such an agreement without a showing of majority status by Local 12 would have been unlawful under the unfair labor practice provisions of § 8(a) and 8(b) of the Act, except for the enactment of § 8(f). *Garment Workers v. NLRB*, 366 U.S. 731, 737, 81 S.Ct. 1603, 1607 (1961). Administration and enforcement of the unfair labor practice statutes have been placed by Congress under the primary jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959).

In suits such as this under § 301 of the LMRA, " . . . courts [are] free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the [Act]", but this principle "is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300-301, 91 S.Ct. 1909, 1925 (1971). However, ". . . the basic policies found controlling in an unfair labor practice context may [not] be disregarded by the courts in a suit under § 301 . . ." *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256, 94 S.Ct. 2236, 2240

(1974). Accordingly, determining the extent to which agreements signed pursuant to § 8(f) will be enforced in a § 301 suit involves interpretation of § 8(f) and consideration of the basic policies underlying its enactment.

> "[T]he starting point for interpreting a statute is the language of the statute itself. *Absent a clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as *conclusive*." (Emphasis added.)
>
> *Consumer Product, etc. v. GTE Sylvania, Inc., supra*, 447 U.S. at 108, 100 S.Ct. at 2056.

The operative language of § 8(f) is as follows:

> "It shall not be an unfair labor practice . . . for an employer . . . to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization . . . because (1) the majority status of such labor organization has not been established under the provisions of § 9 of this Act prior to the making of such agreement . . .: *Provided* . . ., That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to § 9(c) or 9(e)." 73 Stat. 545, 29 U.S.C.A. § 158(f). See, *infra*, App., pp. 1-2.

The words of the statute authorizing the union and the employer "to make an agreement" are readily understood as enabling the parties to enter into a written contract, as has occurred in this case. Nothing in the words of the statute reserve a right for either party to the agreement to avoid the obligations undertaken by simple disavowal or repudiation. This Court has stated that § 8(f) "explicitly contemplates contracts" within the meaning of § 301. *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27, 82 S.Ct. 541, 547 (1962).

Further examination of § 8(f) leads to the language of the last *proviso* which states, in effect, that if the majority status of the union has not been established under § 9 of the Act, the § 8(f) agreement "*shall not be a bar to a petition*" filed under § 9(c) or 9(e). Again, the meaning of the statute is explicit: the NLRB is not to treat a § 8(f) agreement as a bar to the regular processing of a petition for election filed by the employees, the union or the employer under § 9 of the Act. The *proviso* does *not* say that the § 8(f) agreement is to be judicially unenforceable, or that the agreement is to be "at will" and terminable immediately by conduct or by notice until the union attains majority status. Therefore, unless "a clearly expressed legislative intention to the contrary" can be shown, the explicit language of § 8(f) providing only for the processing of a § 9 petition should be regarded as *conclusive*, and the conflicting interpretations urged on behalf of McNeff in this case should be rejected.

B. The Legislative History of § 8(f) Supports Judicial Enforcement of Such Agreements, at Least Until a Union Loss of Election.

The NLRB did not exercise jurisdiction over the building and construction industry until after the 1947 amendments to the Act. Even then, substantial differences existed between the requirements of the Act and the common practices of employers and labor organizations in the construction industry. In 1959, Congress sought to recognize the special circumstances of employment conditions in the construction industry and to make reasonable accommodations for those practices under the Act.

> "The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for

none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction." S.Rep.No. 187, 86th Cong., 1st Sess. 27 ("*Sen. Rep.*"), U.S. Code Cong. & Adm. News (1959), pp. 2318, 2344; I *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* 423 ("*Leg. Hist.*").

"The clearest accommodation to the peculiar conditions of the construction industry" contained in the 1959 revisions of the Act was found in the provisions of § 8(f). *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301, 1309-1311 [9th Cir. (*en banc*) 1981]; *aff'd in pert. part, sub nom. Woelke & Romero Framing, Inc. v. NLRB*, ... U.S. ...., 102 S.Ct. 2071 (1982). The legislative history of § 8(f) records the customs and practices to be legitimized by § 8(f). *Id.*, 654 F.2d at 1309-1310. As described in the Senate Report:

> "In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps one year or in many instances as much as three years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated." *Sen. Rep.* at 28; I *Leg. Hist.* at 424.

The impetus for legislating approval of this practice involved accommodation of two particularly important *employer* interests:

> "One reason for this practice is that *it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based.* A second reason is that *the employer must be able to have available a supply of skilled craftsmen ready for quick re-*

ferral." (Emphasis added.) *Ibid.* See, *Iron Workers*, 434 U.S. at 348, 98 S.Ct. at 659.

However, Congress was motivated as well by the accommodation and protection of union and employee interests. Congress recognized that union representation elections in the construction industry "are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers." *Sen. Rep.* at 55; 1 *Leg. Hist.* at 451. Accordingly, "prehire" agreements were authorized by § 8(f) to enable unions and employers to "stabilize employment conditions in a particular geographic area over an extended period of time." *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 874 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).[2]

The legislative history makes clear that Congress envisioned binding contractual commitments that would assure employers of known future labor costs and a source of skilled craftsmen for construction projects, while enabling unions to stabilize employment conditions over a fixed period of time. However, while authorizing such prehire agreements, Congress was careful to make clear that the *making of* such agreements — *i.e.*, the employer decision to sign the agreement — was to be voluntary. *Iron Workers*, 434 U.S. at 348, n. 10, 98 S.Ct. at 659. As this Court has noted, the House floor leader of the legislation introduced "as an expression of legislative intent" a prior statement of Senator Kennedy regarding § 8(f):

> "Mr. Kennedy: I shall answer the Senator from Florida as follows — and it is my intention, by so answering,

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[2]Without the authority to secure prehire agreements, "[e]mployees . . . were often denied the benefits of union representation because of the temporary and sporadic nature of their employment." *Ruttman Construction Company*, 191 NLRB 701, 702 (1971).

> to establish the legislative history on this question: It was not the intention of the committee to require by [§ 8(f)] *the making of* prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer *to sign* a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements." (Emphasis added.) 105 Cong. R. 18128 (1959), II *Leg. Hist.* 1715.

This Court further noted:

> "The House Conference Report similarly stressed that '[n]othing in such provision is intended . . . to authorize the use of force, coercion, strikes or picketing to compel any person *to enter into* such prehire agreements.' H.R. Rep. No. 1147, 86 Cong., 1st Sess., 42 (1959); I *Leg. Hist.* 946, U.S. Code Cong. & Adm. News 1959, pp. 2318, 2514." (Emphasis added.) *Iron Workers*, 434 U.S. at 348, n. 10, 98 S.Ct. at 659.

This legislative history indicates no more than that Congress intended the employers' decision *to make, to sign, to enter into*, a § 8(f) agreement to be voluntary.[3] At the same time, once entered into, the agreement would be a binding contractual commitment of the employer and the union in order to achieve the other objectives previously discussed.

Obviously, the concept of continuing "voluntary observance" urged on behalf of McNeff[4] would enable an employer to avoid the agreement at any time by conduct or by notice. That concept, assuming reciprocal rights on the part

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[3]But see note 14, *infra*, p. 35.

[4]Pet.Br., p. 27. See, also, Pet.Br., pp. 23-25, arguing that § 8(f) agreements may be ignored without notice. But, *cf.*, Pet.Br., pp. 41-43, stating the intent of § 8(f) that agreements be "entered into voluntarily."

of both parties, would completely undercut the ability of an employer to contract for future labor costs and for a source of skilled labor. Surely Congress did not envision a union being entitled to sign a § 8(f) agreement, wait for the employer to win a construction project, then "repudiate" the agreement and demand higher wages or better working conditions when the employer is committed to proceed with the project. Likewise, if an employer is entitled to disavow its § 8(f) agreement at any time, construction unions would be severely damaged in their efforts to stabilize employment conditions in a geographic area over a period of years.

The care shown by Congress in making its intention clear "that prehire agreements were to be *arrived at* voluntarily" (emphasis added), *ibid.*, arose from the fundamental concern of Congress for the protection of the rights of employees to self-determination, and more particularly to protect against coerced designation of bargaining representatives. This Congressional concern was reflected most clearly in the enactment of § 8(b)(7). *Iron Workers*, 434 U.S. at 346-48, 98 S.Ct. at 658-59. However, as this Court recognized in *Iron Workers*, the concern of Congress for employee self-determination is also reflected in the last proviso to § 8(f).[5] This concern is fully protected by the preservation of § 9 petition rights, as determined by Congress. Creation of an employer right to ignore the agreement at will would do

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[5] "Hence the proviso that an election could be demanded despite the prehire agreement." 434 U.S. at 349, 98 S.Ct. at 659.

nothing to enhance employee self-determination, and would injure employee rights greatly.[6]

No clear legislative intention contrary to the express provisions of § 8(f) can be shown. Quite to the contrary, the legislative history actually reinforces the explicit language of the statute providing only for the right to file a § 9 petition unless majority status has been established. Thus, the language of the statute should be regarded as conclusive. *Consumer Product, etc. v. GTE Sylvania, Inc., supra.* Nothing supports the adoption of statutory policies which would enable an employer to avoid its own agreement by unilateral action.

C. Judicial Enforcement of § 8(f) Agreements Is Consistent With the Iron Workers Decision of This Court.

The support which McNeff seeks for immediate, "at will" avoidance of contract obligations is not to be found in the *Iron Workers* decision of this Court. *Iron Workers* holds that the existence of a § 8(f) agreement does not free a union from the statutory restraint of § 8(b)(7)(C) on picketing for recognition. In so holding, the Court let stand the view of the NLRB "that § 8(b)(7) applies to a minority

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[6]In comparing the protections afforded employee rights under the alternatives of unilateral employer "repudiation" of § 8(f) agreements *versus* judicial enforcement of such agreements to the date of NLRB certification of union loss of election, either alternative preserves the right of employee self-determination through a § 9 petition filed by the employer or the employees. However, the first alternative seriously undercuts employees' rights relating to terms and conditions of employment. If subject to employer "repudiation," employees would be "at risk" as to wages and fringe benefits until NLRB certification of majority status in every bargaining unit — an approach Congress regarded as "not feasible." Clearly, the alternative most protective of employee rights lies in the enforcement of contract rights arising under § 8(f) agreements until the NLRB certifies that the concerned employees have voted against further union representation.

union picketing to enforce a prehire contract", 434 U.S. at 349, 98 S.Ct. at 659, on grounds that "[n]othing in the language or purposes of either § 8(f) or § 8(b)(7) forecloses this application of the statute." *Id.*, 434 U.S. at 346, 98 S.Ct. at 658. In other words, § 8(f) need not be read as authorizing picketing for more than 30 days to obtain union recognition, where employees have not "been given a chance to vote on the question of representation", and when the Congressional view as expressed in § 8(b)(7)(C) was that "[p]icketing in these circumstances . . . impermissibly interfere[s] with the employees' freedom of choice." *Id.*, 434 U.S. at 346-47, 98 S.Ct. at 658.

In the *Iron Workers* decision, this Court held the union to the express requirements of § 8(b)(7) of the Act and refused to read into § 8(f) broader implications than are clear in its language and legislative history. By similar analysis, the Court should reject the employer's effort in this case to read into § 8(f) broader implications which would enable the employer to avoid its consensual obligations without involving the election processes of the Board. In the same manner that Congress could have written explicit language overriding § 8(b)(7) upon the signing of a § 8(f) agreement, if such had been its content, Congress could have stated explicitly that § 8(f) agreements are to be at all times "at will" and subject to immediate or retroactive repudiation by the employer before majority status is attained by the union. Congress did not do so, and no basis can be found for adding such an effect to § 8(f) more than twenty years after its passsage. Surely such a unique characteristic of prehire agreements would have been explicit in the statute, clear in the legislative history, and immediately known to all advocates for the contending forces in the legislative effort. Such has not been the case.

As *Iron Workers* held that a union cannot *enforce* a § 8(f) agreement except subject to the strictures of statute [§ 8(b)(7)], the employer in this case should not be permitted to *avoid* a § 8(f) agreement except according to the provisions of statute — *i.e.*, by petitioning for an election under § 9 as set forth in the *proviso* to § 8(f).

Iron Workers did not purport to decide whether a § 8(f) agreement is judicially enforceable, or whether a union's majority standing is subject to litigation in a § 301 suit to enforce the § 8(f) agreement.[7] In *Iron Workers*, the union asserted that § 8(f) agreements are judicially enforceable, citing *Retail Clerks International Association v. Lion Dry Goods, Inc., supra*, for that premise, and argued that *judicial enforceability precluded applying § 8(b)(7)* to restrain picketing to enforce the agreement. This Court responded by pointing out that *Lion Dry Goods* held only that § 8(f) agreements are contracts within the meaning of § 301, but that such a contract might still be unenforceable due to lack of majority status. While the logic of the Court's theoretical analysis is valid, the flaw in logic actually occurred in the union's original premise, thereby making the Court's response unnecessary. *The judicial enforceability of a § 8(f) agreement simply does not preclude application of § 8(b)(7) to restrain union picketing*. The two concerns are almost totally separate. *Nor is the reverse of that premise so*, as the employer urges in this case. The application of § 8(b)(7) to restrain union picketing for recognition, as required by *Iron Workers*, does not preclude judicial enforcement of the existing § 8(f) agreement. The *Iron Workers* decision ex-

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[7]McNeff insists to the contrary. Pet.Br., p. 37. But clearly, in *Iron Workers* this Court had before it neither a § 301 case nor the issue of any available defense in such a case.

plains that the Board's interpretation of the statute "does not . . . render § 8(f) meaningless." 434 U.S. at 349, 98 S.Ct. at 659. To support that precise point, the Court then states by footnote as follows:

> "A comparable situation obtains concerning hot-cargo clauses, which are permitted in the construction industry by § 8(e), 29 U.S.C. § 158(e), but which cannot be enforced by picketing." *Ibid.*

In that "comparable situation," hot cargo agreements within the scope of the construction industry proviso to § 8(e) are lawful, *Woelke & Romero Framing, Inc. v. NLRB*, ... U.S. ....., 102 S.Ct. 2071, 2076-2080 (1982), and are enforceable in § 301 suits. *Brogan v. Swanson Painting Co.*, 682 F.2d 807 (9th Cir. 1982). *Cf., Kaiser Steel Corp. v. Mullins*, ... U.S. ....., 102 S.Ct. 851, 859-860 (1982), holding that an agreement may be tested for lawfulness under § 8(e) before enforcement is granted in a § 301 suit.

The clear implication of this Court's parallel analysis in *Iron Workers* is that the meaning retained by § 8(f), like § 8(e), encompasses judicial enforcement of the agreement made, while picketing to enforce § 8(e) and § 8(f) agreements is restricted by § 8(b)(4) and § 8(b)(7), respectively.

Other comparable situations exist under collective bargaining law in which agreements made are judicially enforceable, although not enforceable by economic action. Perhaps the most commonly occurring example involves agreements reached on non-mandatory subjects of bargaining. An unfair labor practice occurs if economic action is used to obtain an agreement on a non-mandatory, permissive subject of bargaining, *NLRB v. Wooster/Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 722-723 (1958), but otherwise such agreements are enforceable. *Ibid.* At the same time that an agreement on a permissive subject of

bargaining is "enforceable if agreed to" by the parties, *ibid.*, no unfair labor practice occurs under § 8(a)(5) or § 8(b)(3) if one of the parties makes a "unilateral change" in violation of the agreement. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185, 92 S.Ct. 383, 400 (1971). In this light, the Board view enforced in *Iron Workers* that no violation of § 8(a)(5) occurs by the breach of a § 8(f) agreement until union majority status is established simply does not carry the necessary implication that the breach cannot be remedied in a § 301 suit.[8]

In *Pittsburgh Plate Glass*, the primary question presented was "whether a mid-term unilateral modification that concerns, not the benefits of active employees, but the benefits of already retired employees . . . constitutes an unfair labor practice." *Id.*, 404 U.S. at 159-160, 92 S.Ct at 387-388. In concluding that a retired employee is not an "employee" within the meaning of the Act and that benefits for a retired employee is only a permissive subject of bargaining, the Court decided that no unfair labor practice occurs under § 8(a)(5) when the employer changes such benefits during

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[8]An unfair labor practice proceeding is ". . . government litigation to enforce carefully drafted prohibitions . . ." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 221-222, 82 S.Ct. 1328, 1342 (1962) [dissenting opinion adopted by majority in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583 (1970)].

> "A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." *NLRB v. Industrial Union*, 391 U.S. 418, 424, 88 S.Ct. 1717, 1721 (1968).

The Board's view that "government litigation" should not be pursued to enforce a § 8(f) agreement which is not shown to be the instrument of the majority of employees covered is reconcilable with the policies of the Act (see *Iron Workers*, 434 U.S. at 343-344, 350, 98 S.Ct. at 656-657, 660) and with the administrative need to conserve scarce agency resources. However, the unavailability of "government litigation" under § 8(a)(5) to enforce a § 8(f) agreement does not, as McNeff contends, foreclose the use of a § 301 suit as the proper forum "to adjudicate private rights" created by the agreement of the parties.

the term of a collective bargaining agreement. The Court finally concluded:

> "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, see n. 20, *supra*, not in an unfair labor practice proceeding." *Id.*, 404 U.S. at 188, 92 S.Ct. at 402.

At its note 20, *Pittsburgh Plate Glass* explains that the retired employees could pursue a § 301 suit to remedy the employer's change in their benefits, even though no unfair labor practice had occurred. *Id.*, 404 U.S. at 181, n. 20, 92 S.Ct. at 398-399.

Likewise in the case of an agreement permitted by § 8(f), the remedy for breach lies in a § 301 suit rather than a § 8(a)(5) proceeding.

> "Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, 404 U.S. at 186-187, 92 S.Ct. at 401, quoting from the House Conference Report on § 301.

Agreements made under § 8(f) are intended to be judicially enforceable, and the *Iron Workers* decision is entirely consistent with that outcome.

D. Decisions of the NLRB Reflect a View of § 8(f) and of the Iron Workers Decision Which Is Compatible With Judicial Enforcement of § 8(f) Agreements Prior to the Board's Certification of Union Loss of Election.

In a more recent § 8(b)(7) case, *International Union of Operating Engineers, Local 150 (Tri-City Excavating, Inc.)*, 255 NLRB No. 83, 106 LRRM 1399 (1981), the Board added context to its views enforced in *Iron Workers*

by holding that picketing beyond 30 days without filing a § 9 petition does not violate § 8(b)(7)(C) when the purpose of the picketing is limited to enforcing the payment of past due fringe benefit contributions accrued under the § 8(f) agreement. In accord with its analysis in *Iron Workers*, the Board proceeded by determining "whether an object of the picketing was recognitional." The Board distinguished *Iron Workers* as follows:

> "In [Iron Workers] . . . [s]atisfaction of the picketing demands there would have required current application of the 8(f) contract, including recognition of the labor organization as bargaining representative. . . . Unlike that situation, the 'enforcement' sought by [Local 150's] picketing was payment of an alleged past obligation under the 8(f) contract and did not require current application of the contract." *Id.*, 106 LRRM at 1403.

This decision of the Board illustrates that the essential context of *Iron Workers* was the regulation of picketing for recognition, and should put aside any notions that the Board views § 8(f) agreements as "at will" arrangements which may be avoided unilaterally either by breach or by notice.

A further development of the context within which the Board views § 8(f) agreements is provided by a recent decision in a representation case, *Giordano Construction Co. (Carpenters, Local 1205)*, 256 NLRB No. 10, 107 LRRM 1164 (1981). In *Giordano*, the regional director of the Board had found that the union had achieved majority status in a permanent work force before the filing of the § 9 petition by the employer, thereby causing the § 8(f) agreement to mature into a § 9 relationship and providing a contract bar to the petition. However, the Board disagreed, finding that the work force of the employer was never sufficiently stable during a period of almost two years to provide a basis upon

which the union could make a showing of majority status. In the absence of such a permanent and stable work force, majority status sufficient to bar an election could be established only on a jobsite-by-jobsite basis. Accordingly, since the employer had no current jobsite on which prior attainment of majority status could be established by the union, the § 8(f) agreement could not provide a bar to the election, and the Board ordered the § 9 petition reinstated.[9]

The *Giordano* decision is instructive in several respects. First, the employer filed a § 9 petition to test the representation views of eligible employees, rather than contending that the § 8(f) agreement was automatically avoided by its breach, or by repudiation, or by any other unilateral action of the employer. Second, the decision illustrates the special difficulties faced by a construction union in attempting to satisfy the Board's requirements for establishing a contract bar to an election, and the concomitant readiness of the Board to conduct an election among construction industry employees except under very limited circumstances. Third, the case shows that the Board does not view § 8(f) agreements as noncontractual arrangements which may be unilaterally abandoned; the Board did not treat the § 8(f) agree-

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[9]McNeff seriously misconstrues the Board's readiness to conduct an election unless majority status is shown in a permanent and stable work force. McNeff argues that an employer may decide unilaterally to apply a § 8(f) agreement at a "union" jobsite and to ignore the agreement at a "nonunion" jobsite, even though the agreement expressly covers all jobsites of the employer. Pet. Br., pp. 32-33. Of course, the "union" and "nonunion" classification begs the question whether the agreement applies to a jobsite, because the jobsite will be "union" if the agreement is honored and enforced there. The salient point remains, however, that the Board's willingness to conduct an election under § 9 of the Act unless majority status in a permanent and stable work force can be shown does not release the employer's obligation to perform according to the consensual agreement, at least until the Board certifies a union loss of election.

ment as a nullity upon finding a lack o majority status, but merely held that the agreement would not bar an election and reinstated the § 9 petition.

E. Terms of Employment Should Be Fixed by the § 8(f) Agreement and Judicially Enforceable at Least Until the Date the NLRB Certifies Election Results.

To demonstrate the meaning of the Board's view that a prehire agreement is "voidable" until union attainment of majority status, this Court in *Iron Workers* quite properly acknowledged *only* the rights of the employees, the employer and the union to petition for an election under § 9 of the Act as the appropriate avenue for avoiding the agreement.[10] With the filing of a § 9 petition as the appropriate means for calling into question the majority status of the union, the question arises whether the date of filing the petition should have any significance for the judicial enforcement of the § 8(f) agreement. In other words, should the filing of the § 9 petition itself interrupt the judicial enforcement of a § 8(f) agreement, or should judicial enforcement proceed without interruption at least until the date on which the NLRB certifies the results of the union representation election?

Nothing in the language of § 8(f) causes the terms of the § 8(f) agreement to be interrupted by the filing of a § 9 petition. The filing of the petition merely calls in question

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[10]This Court's statements in *Iron Workers* are as follows:

(1) "The employer and its employees — and the union itself for that matter — may call a bargaining representative election at any time." 434 U.S. at 345, 98 S.Ct. at 657.

(2) "The proviso expos[es] unions with prehire agreements to inquiry into their majority standing by elections under § 9(c) . . ." *Ibid.*

(3) "Hence the proviso that an election could be demanded despite the prehire agreement." *Id.*, 434 U.S. at 349, 98 S.Ct. at 659.

the majority status of the union — a question properly raised by the employer, the employees, or the union. See note 10, *supra*. The fact that the union's majority status is open to question certainly would not invalidate a § 8(f) agreement, since the statute squarely permits such agreements at times, including "prehire", when the union undoubtedly has not established majority status. Moreover, although a petition has been filed, a satisfactory showing of prior attainment of majority status will bar the petition, and no election will be held.

> "[W]hen the union successfully seeks majority support, the prehire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Iron Workers*, 434 U.S. at 350, 98 S.Ct. at 660.

Accordingly, whether "majority support" is established administratively through the General Counsel of the Board in order to raise a "contract bar" to a § 9 petition, or is established upon the Board's certification of election results, the terms of employment set forth in the prehire agreement continue in effect as the chosen instrument of parties to a § 9 collective bargaining relationship.

Obviously, the agreement would be judicially enforceable after attainment of majority status by either method. Under that circumstance, no good reason can be advanced for creating a period of *hiatus* between the filing of the petition and the date of final Board action on the petition, during which the judicial enforceability of the § 8(f) agreement would be in doubt. *Hiatus* in judicial enforceability of the § 8(f) agreement during the pendency of a § 9 petition would create unnecessary and desirable instability in the labor environment. Under conditions of *hiatus*, the employees could not be certain whether to rely upon the terms, including

fringe benefits, of the § 8(f) agreement or to bargain individually with their employer concerning wages, hours and working conditions. Moreover, trustees of employee benefit trusts would not know whether to provide medical insurance and other benefits to such employees in the interim, if judicial enforcement of employer contributions could later be denied in the event the union loses the Board election.

One of the fundamental policies of the Act, and of § 8(f), is to promote stability in labor relations. 29 U.S.C.A. § 151. *Infra*, pp. 37-39. A § 8(f) agreement should be judicially enforceable as a contract setting the terms of employment at least until the date on which the Board certifies election results showing that the union has failed to win a majority of votes cast.[11] In this case, such a certification by the Board occurred on November 17, 1980, well after the date of April 30, 1979, through which the judgment of the district court enforced the Agreement between McNeff and Local 12.

II.

PERMITTING AN EMPLOYER TO AVOID JUDICIAL ENFORCEMENT OF A § 8(f) AGREEMENT BY MEANS OTHER THAN FILING A § 9 PETITION WOULD UNWISELY REQUIRE STATE AND FEDERAL COURT LITIGATION OF EMPLOYEE REPRESENTATION ISSUES ARISING IN THE CONSTRUCTION INDUSTRY.

A. If "Repudiation" by the Employer's Unilateral Conduct Is a Defense in a § 301 Action, Then Union Majority Status Must Be Litigated to Determine Whether the § 8(f) Agreement Presents a "Contract Bar" to the Repudiation.

If an employer may avoid future performance under a § 8(f) agreement only by filing a § 9 petition which results in a union loss of election, the determination of all issues

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[11] Whether a § 8(f) agreement is binding or may lawfully be observed after a union loss of election under arious circumstances, such as an unstable work force, is an issue not presented by this case.

concerning employee representation will be handled according to the normal processes of the NLRB. Those processes would ultimately involve self-determination by the employees as to whether the agreement signed by the employer and the union should remain in effect. On the other hand, if the employer may take unilateral action to avoid the § 8(f) agreement, such as by giving formal notice of repudiation or engaging in other "bald conduct" indicating a repudiation (Pet. App., p. 8), then the employer's "repudiation" could be presented as an affirmative defense against judicial enforcement of the § 8(f) agreement in a § 301 suit.

If repudiation is available to the employer at all, the repudiation must occur prior to the union's attainment of majority status. *Iron Workers*, 434 U.S. at 350, 98 S.Ct. at 660. Therefore, as the Court of Appeals recognized (Pet. App., pp. 7-8), whenever an employer raises the defense and proves a repudiation, whether the union attained majority status before the date of repudiation becomes relevant. Since state courts have concurrent jurisdiction with federal courts over § 301 actions to enforce labor agreements, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519 (1962), employee representation issues previously reserved for determination by the NLRB would be subject to litigation in § 301 suits brought in state courts as well as federal courts.

B. Determining Majority Status Involves a Wide Range of Employee Representation Issues Heretofore Administered by the NLRB.

Determining whether union majority status was attained prior to an employer repudiation involves more than the "[r]e-creation of past relationships for the purpose of resolving factual disputes . . ." (Pet. App., p. 8.) Since a

"majority" can be established logically only in relation to a particular "whole", a court seeking to establish majority status would necessarily be required to determine the "appropriate bargaining unit" of employees eligible to participate in selecting the bargaining representative. Of course, according to "the distribution of authority made by Congress . . .", determining the appropriate bargaining unit is ordinarily subject to the discretionary authority of the NLRB. *South Prairie Construction Company (Local 627, International Union of Operating Engineers*, 425 U.S. 800, 806, 96 S.Ct. 1842, 1845 (1976). *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S.Ct. 789, 793 (1947). In § 301 suits, the discretion available for exercise by the Board in making unit determinations would be wielded instead by the courts deciding majority status issues — a course of action viewed by the Court of Appeals as improper in other contexts. *Local 3-193, International Woodworkers v. Ketchikan Pulp Company*, 611 F.2d 1295, 1299, 1301 (9th Cir. 1980).

In addition, the state and federal courts would be required to determine the eligibility of particular employees to participate in selection of a bargaining representative. That concern reaches its most complex proportions under the employment conditions of the construction industry, a circumstance which had led Congress to conclude that Board representation elections "are not feasible" as a prerequisite to collective bargaining. *Sen. Rep.* at 55; 1 *Leg. Hist.* at 451. In the construction industry, the Board has designed a unique voter eligibility rule. *Daniel Construction Company, Inc. (United Association, etc.)*, 133 NLRB 264, 48 LRRM 1636 (1961).

Assuming the appropriate bargaining unit has been determined and the eligible employees have been identified, the courts would then face additional issues in considering

the adequacy of proof of union support among employees in the unit. Even union membership has not always been treated as conclusive proof of union support. At the same time, absence of union membership, while the employee is receiving the benefits of a § 8(f) agreement and refraining from filing a § 9 petition to question the union's status as bargaining representative, likewise may be unreliable proof of *lack* of union support.

The proper determination of each of these issues in every particular case involves important use of the Board's discretion in achieving the policies of the Act. For example, whenever the Board is establishing the rules for determining majority status, or determining majority status in a particular case, a paramount consideration for the Board is the policy of the Act favoring a secret ballot election in which employees actually vote. In such circumstances, the rules and decisions of the Board reflect, quite properly, a discretionary bias in favor of holding the election and against finding a "contract bar". Frequently such decisions must be made in a total context involving economic strikers, unfair labor practice strikers and strike replacements. Such important discretion in administering the Act is best exercised on a case by case basis and, according to Congressional design, by the Board.

C. Private Litigation in State and Federal Courts Is Not a Suitable Arena for Determination of Employee Representation Issues.

The courts have no access to a secret ballot election process in which employees may ultimately express support or nonsupport for a union representative. Thus, the focal point of the Board's administration of employee representation issues under the Act is entirely missing from the processes of the courts. As a result, even if the courts were entirely

familiar with the Board's views and decisions relating to employee representation issues, those views and decisions would require complete reassessment in light of the importantly different circumstance facing the courts. Stated another way, the Board itself would likely establish different rules and make different discretionary decisions on employee representation issues *if no secret ballot election were available* as a culmination of its inquiry.

When the General Counsel of the NLRB rules that the union has failed to provide sufficient proof of prior attainment of majority status, the ultimate result is an election to decide the issue. By comparison, if a court determines a lack of majority status, no election is held in which the employees are permitted to affirm by secret ballot their support for continuation of the collective bargaining agreement; the employer would simply be permitted to repudiate and abandon the agreement. These important distinctions in the processes and outcome of court/Board inquiries into majority status, together with the prospect of a great multiplicity of courts rather than a single, expert administrative agency making the decisions, show the high risk of major distortions in the administration of the Act flowing from § 301 litigation of employee representation issues.[12]

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[12]Moreover, the courts themselves are already over-burdened with litigation, and can scarcely afford broadened responsibility for new disputes previously relegated by Congress to resolution by administrative agencies. Indeed, a strong case can be made for lightening the current caseload of the courts by legislatively moving more types of disputes to administrative tribunals. Aside from Congressional action, however, judicial restraint would surely seem to foreclose a wholesale removal of employee representation disputes from the NLRB to the courts.

D. Court Adjudication of Employee Representation Issues Would Adversely Displace the NLRB's Administrative Discretion and Authority Under the Act.

Not all effects of court litigation of employee representation issues on the functioning and jurisdiction of the NLRB can be anticipated. However, some of the adverse consequences are obvious and some additional effects are apparent upon consideration of the interplay among private parties, the courts and the Board. Employers certainly could not be expected to file § 9 petitions, involving possible affirmance of union support and continuation of the collective bargaining agreement in effect, when the alternative is immediate repudiation with only the risk of proof of past union support. For a variety of similar reasons, courts would become the preferred forum for employee representation disputes, and the Board would lose much of its jurisdiction and influence in the process. Employees and unions might still file § 9 petitions, but even that event would present difficult problems of comity concerning prior court decisions on related issues.

Of course, this barely scratches the surface of the implications of court encroachment upon the statutory jurisdiction of the Board. The decisions of this Court have considered the subject in much greater detail in cases involving conduct within the unfair labor practice provisions of the Act, *Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S.Ct. 161, 165 (1953), *San Diego Building Trades Council v. Garmon*, *supra*, and the extent to which § 301 provides an exception to the preemptive jurisdiction of the NLRB, *Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at 300, 91 S.Ct. at 1925. A recent decision of the Court of Appeals has considered the primary jurisdiction doctrine in the context of whether an employe[illegible]may raise lack of union majority

status as a defense in a § 301 suit to enforce a collective bargaining agreement which is *not* a § 8(f) agreement. *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, ___ F.2d ___, No. 79-4199 (9th Cir., Oct. 12, 1982). After considering the doctrine in light of this Court's decision in *Kaiser Steel Corp. v. Mullins*, *supra*, and the decisions in *Iron Workers* and *Lion Dry Goods*, *supra*, as well as the impact of § 10(b) of the Act, the Court of Appeals in *Glaziers* concluded as follows:

> "[T]he Employers are precluded from asserting, as a defense to the section 301 action, that the Union lacked majority status at the time of the execution of the collective bargaining agreement because of the preemption of this issue under the primary jurisdiction doctrine." ___ F.2d at ___.

The enactment of § 8(f) provides not the slightest hint of a "legislative determination" that courts should be empowered to begin deciding employee representation issues which are at the heart of Board jurisdiction. Section 8(f) itself was, of course, placed by Congress in the *centrum* of Board jurisdiction over unfair labor practices: § 8. In the absence of such a clear legislative determination, the Court should not interpret § 8(f) in a manner which revises the boundaries of Board jurisdiction and enlarges § 301 jurisdiction by such major proportions.

E. Exclusive NLRB Administration of Employee Representation Issues Will Be Preserved by Holding That an Employer's Ability to Avoid the Terms of Its § 8(f) Agreement Is Limited to Filing a § 9 Petition.

The significant dangers of displacing Board jurisdiction and adding burdens to court caseloads are created entirely by the proposition that new meaning, unsupported by lan-

guage or legislative intent, should be read into § 8(f) — *i.e.*, that employers are intended to have the right to avoid § 8(f) agreements by unilateral action without invoking the election process of the Board, so long as the union cannot prove prior attainment of majority status. On the other hand, the jurisdiction of the Board is entirely preserved and employee representation issues are kept out of the trial courts by the statutory interpretation which relies straight-forwardly on the language and express legislative intent of § 8(f).[13]

By treating the filing of a § 9 petition as the only means for an employer or the covered employees to avoid the terms of a § 8(f) agreement, all employee representation issues will be determined according to the statutory administrative processes of the Board. As set forth in the *proviso* to § 8(f), the Board will proceed directly to an election on a § 9 petition without regard to a § 8(f) agreement, unless the union can prove majority status has already been achieved. Thus, all issues concerning appropriate bargaining unit, eligibility of voters, permanency and stability of work force, and adequacy of showing of union support will be decided entirely within the § 9 proceedings.

If the Board determines that majority status has been shown, the § 9 petition will be dismissed and the collective bargaining agreement will continue to be judicially enforceable. If the Board proceeds to conduct an election and the union wins majority support, the collective bargaining agreement will continue to be judicially enforceable. On the

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[13]McNeff's arguments regarding whether the Board or the courts should decide employee representation issues seem to be at odds. On the one hand, McNeff asserts (erroneously) that *Iron Workers* already requires litigation of majority status in § 301 suits. Pet.Br., p. 37. On the other hand, McNeff argues that the district court was required to defer to the election processes of the Board for determination of employee representation issues. Pet.Br., pp. 37-39.

other hand, if the Board certifies election results showing lack of majority status, that certification can be easily proved as a defense to enforcement of the agreement from that date forward.

III.

IF AN AGREEMENT OBTAINED BY A UNION'S COERCIVE CONDUCT IS OUTSIDE THE INTENDED SCOPE OF § 8(f), THEN THE CONDUCT FALLS WITHIN THE SCOPE OF § 8(a) AND (b) OF THE ACT AND IS SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NLRB.

McNeff urges that proof of coercion by a union in obtaining a § 8(f) agreement should be permitted as an affirmative defense against enforcement of the agreement in a § 301 suit. Once again, the starting point in determining whether this result is supported by the statute is the language of § 8(f) itself. Section 8(f) states:

> "*It shall not be an unfair labor practice under subsections (a) and (b) of this section* for an employer . . . to make an agreement . . . with a labor organization . . ." (Emphasis added.) 29 U.S.C. § 158(f). *Infra*, Appendix, p. 1.

Thus, by the very words of the statute, the conduct involved in making an agreement is shielded from treatment as "an unfair labor practice" under § 8(a) and (b) of the Act, unless the conduct loses the protection of § 8(f) by falling outside the intended scope of the statute. As previously discussed, *supra*, pp. 14-16, Congress intended that the decision to enter into a § 8(f) agreement should be voluntary. Therefore, arguably an agreement arrived at involuntarily may fall outside the protection of § 8(f). If that were the case, the words "[i]t shall not be an unfair labor practice . . ." would not apply and the coercive conduct, as well as the resulting agreement, would fall squarely within the provisions of § 8(a) and (b) of the Act.

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council v. Garmon, supra*, 359 U.S. at 245, 79 S.Ct. at 780.

Without deciding the point, union picketing to obtain a prehire agreement may be viewed as a violation of § 8(b)(1)(A) as interference with the right of employees to self-organization. On the other hand, picketing to obtain a § 8(f) agreement may be viewed as picketing for union recognition, as in *Iron Workers*, and permitted within the limits of § 8(b)(7)(C).[14]

With alleged coercive conduct in obtaining a § 8(f) agreement so squarely governed by § 8 of the Act, no support can be found in § 8(f) or § 301 for opening such conduct to conflicting regulation by federal and state courts. A private party seeking relief from alleged coercion in obtaining a § 8(f) agreement should do so by filing an appropriate unfair labor practice charge with the Board,[15] or by filing § 9 petition for an election in which the employees may disavow the union representative.

In this particular case, Local 12 did not picket to obtain the Agreement with McNeff. McNeff signed the Agreement after being told by a superintendent of a general contractor, in the presence of a representative of Local 12, that McNeff

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[14]This Court has not yet decided the issue. See *Woelke & Romero, Inc. v. NLRB, supra*, ... U.S. ....., 102 S.Ct. at 2082, n. 17.

[15]One important reason for preempting the presentation of coercion as a defense in § 301 suits is that a charge filed with the Board is required to be timely within the limits of § 10(b) of the Act. *Cf., Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors, supra*, holding that litigation of majority status in § 301 suits is preempted by the primary jurisdiction doctrine for this reason and others.

could continue work as a subcontractor on the construction project only if McNeff would sign an agreement with Local 12. As recently observed by this Court, a decision by a subcontractor to sign a § 8(f) agreement in order to remain eligible for work on a construction site in the face of enforcement of a "union signatory" subcontracting clause is a frequent occurrence. *Woelke & Romero, Inc. v. NLRB, supra,* .... U.S. ...., 102 S.Ct. at 2082.

The decision by McNeff to sign the agreement was voluntary in the sense that the employer could freely choose to sign the Agreement or discontinue working as a subcontractor on the construction project. A voluntary act is not distinguished from a coerced one merely by the absence or presence of economic considerations. Such considerations are undoubtedly present whenever a § 8(f) agreement is signed.

IV.

THE POLICIES OF THE ACT, OF THE LMRA, AND OF THE MORE RECENT AMENDMENT OF ERISA SUPPORT JUDICIAL ENFORCEMENT OF THE PARTIES' AGREEMENT ACCORDING TO ITS TERMS.

A. The Act Intends to Promote Stability in Labor Relations Through Encouragement of Agreements on Employment Conditions.

National labor policy has been erected on the basic premise that the law will require unions and employers to bargain in good faith, but otherwise the bargaining "parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Insurance Agents,* 361 U.S. 477, 488, 490, 80 S.Ct. 419, 426-27 (1960). *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 282-

284, 92 S.Ct. 1571, 1579-1580 (1972). "One of [the] fundamental policies [of the Act] is freedom of contract." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102, 108, 90 S.Ct. 821, 823, 826 (1970). This heavy reliance upon freedom of contract wisely achieves improved stability in labor relations, and thereby promotes commercial productivity, through two important mechanisms. First, the contract itself actually sets forth the terms of performance expected from each of the parties, so that those terms become known quantities through relatively careful planning. Second, the existence of the contract then brings into play the natural rule of human conduct that "a person ought to do what the person has agreed to do." The strength of this second factor is demonstrated partly by the experience that, once an agreement has been made, the vast majority of employers, employees and unions abide by their agreements without need for intervention by the Board or the courts.

In that perspective, the Court should weigh carefully the potential impact of a decision that an employer need not perform as agreed. There can be no mistake that McNeff made a contractual commitment to abide by a written schedule of wages and working conditions for a period of time into the future. McNeff made that agreement knowing that Local 12 did not represent a majority of employees at the time. An agreement having been made, nothing should intervene to relieve the accepted obligation except the Congressional provision for a vote of the employees to disavow the bargaining representative. A holding by this Court that the Act contains an unwritten policy which by implication enables an employer to abandon a consensual contract would contain a message destructive to the purposes of the Act.

B. The Enactment of § 301 and § 302(c)(5) of the LMRA Intended to Assure Ready Access to a Forum for Enforcement of Written Contracts Covering Fringe Benefit Contributions.

The enactment of § 301 in 1947 reflected:

> ". . . a primary concern that unions as well as employees should be bound to collective bargaining contracts. But there was also a broader concern — a concern with a procedure for making such agreements enforceable in the courts by either party. . . .
>
> ". . . Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' " *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 453-454, 77 S.Ct. 912, 916 (1957).

The passage of § 301 provided authority for the development of a uniform body of federal substantive law based on "the policy of our national labor laws" to be applied in enforcing collective bargaining agreements. *Id.*, 353 U.S. at 456-457, 77 S.Ct. at 918. Indeed, this Court has held that the subject matter of § 301 "is peculiarly one that calls for uniform law," based on a rationale that bargaining parties would more willingly enter into contracts "for final arbitral or judicial resolution of disputes" if encouraged by a uniform system of laws assuring the prompt enforceability of their agreements. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104, 82 S.Ct. 571, 576-577 (1962). However, as previously noted, the scope of jurisdiction granted by § 301 was intended to include only those disputes governed by the terms of the agreement itself. *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 300-301, 91 S.Ct. at 1925.

In addition, § 302(c)(5) of the LMRA enacted in 1947 [29 U.S.C.A. § 186(c)(5)] requires that any employer agreement to pay funds to a labor-management employee

benefit trust be *in writing*, as a means of fighting corruption in employer-union relations, and in order to assure that the employees working under the agreement will have a reliable basis for knowing the terms of their employment, including fringe benefits. *Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679 (1977); *Waggoner v. Dallaire*, 649 F.2d 1362, 1366 (9th Cir. 1981). Interpreting § 8(f) as permitting an agreement which can be repudiated or modified unilaterally by either party, or which can be treated as entirely voluntary or a nullity, would contravene the policies of § 302(c)(5).

Thus, when § 8(f) was enacted in 1959, § 301 and § 302(c)(5) already contained important protections of the enforceability, security and reliability of agreements concerning employer payments to employee benefit trusts. In the absence of clear legislative history to the contrary, § 8(f) should be interpreted in a manner consistent with the fundamental policies of those statutes.

C. Recent Enactment of § 515 of ERISA Reinforces the Principles That § 301 Jurisdiction Encompasses Only Those Disputes Governed by the Terms of the Contract Itself, and That the Contract Should Be Enforced According to Its Terms.

Section 515 of ERISA was enacted by amendment in 1980 to "simplify delinquency collection" by trustees of employee benefit plans, based on a perception by Congress that "simple collection actions brought by plan trustees ha[d] been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions." *Kaiser Steel Corp. v. Mullins, supra*, 102 S.Ct. at 861 (1982). Section 515 is properly to be considered in this case because "a court is to apply the law in effect at the time it renders its decision" and McNeff cannot show

that doing so would result in manifest injustice or that statutory direction or legislative history requires the contrary. *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974).

The express language of § 515 (App., *infra*, p. 3) requires an employer to pay contributions according to the terms of the agreement ". . . to the extent not inconsistent with law . . . ." An agreement permitted by § 8(f) is certainly "not inconsistent with law," and neither would judicial enforcement of such an agreement ". . . be enforcing . . . precise conduct made unlawful . . . ." *Cf., Kaiser Steel Corp. v. Mullins, supra*, 102 S.Ct. at 857. Thus, § 515 expresses a clear requirement that an employer party to an agreement such as the Agreement between McNeff and Local 12 "shall pay" contributions according to the terms of the agreement.[16]

This Court has had previous opportunitites to consider the reconciliation process involved in reaching an accommodation between the policies of older statutes and a more recently enacted statute.

> "Statutory interpretation requires more than concentration upon isolated words; rather, *consideration must be given to the corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions*.
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> * * *
>
> "Thus it [is] the task of the courts to accommodate, to reconcile the older statutes with the more recent

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[16] A comprehensive presentation and analysis of the legislative history of § 515 of ERISA, its purpose and intent, is presented in the Brief of *Amicus Curiae* filed in this case on behalf of the National Coordinating Committee for Multiemployer Plans (*Am. Cur.* Br., Argument, Parts A and B. To avoid redundancy in the recitation of legislative events underlying the interpretation of § 515 presented here, the Court is respectfully referred to that *amicus* brief for a fuller explication of § 515 within the views of respondent Trustees.

ones." (Emphasis added.) *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-251, 90 S.Ct. 1583, 1592-1593 (1970).

See, also,

Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. Co., 353 U.S. 30, 77 S.Ct. 635 (1957).

Reconciliation of § 8(f) with the earlier enacted provisions of § 301 and § 302(c)(5) and the later enacted § 515 of ERISA is much less problematical than the circumstances faced in *Boys Markets* and *Chicago River*, because neither the language of the statutes nor their underlying policies are "ostensibly inconsistent." The reversal of both cases [*Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 488 F.Supp. 816 (D.C. 1980), *reversed*, 681 F.2d 1 (D.C. Cir. 1982); *Western Washington Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *reversed*, No. 80-3024 (9th Cir. 1982 — *unpubl.*), *pet. cert. pend.*, No. 81-2209] expressly disapproved in the legislative history of § 515 *on grounds independent of the enactment of § 515* indicates that Congress was right in viewing those lower court decisions as "incorrectly decided" under the pre-existing law. 126 Cong.Rec. H7899 (daily ed. Aug. 26, 1980). Congress saw § 515 as "intended to clarify the law," *ibid.*, and, thus, as consistent with the pre-existing law.

Reading § 8(f) as permitting an employer to avoid a § 8(f) agreement only by filing a § 9 petition which results in a union loss of election: (1) is supported by the express language and legislative intent of § 8(f); (2) is consistent with the long held view that § 301 jurisdiction covers only "those disputes that are governed by the terms of the collective bargaining agreement itself," *supra*, p. 10; (3) is consistent with the requirement and policy of § 302(c)(5) that employer agreements to pay contributions to labor-management employee benefit trusts be in writing

and reliable; (4) would maintain the principles of the *Garmon* rule by preserving Board jurisdiction in employee representation disputes; and (5) is entirely consistent with the expressed motivations for enactment of § 515 of ERISA.

This clear consistency in the reading of all four statutes and the interconnecting policies which run through "the total corpus of pertinent law" is a compelling rationale for the judicial enforcement of agreements made pursuant to § 8(f).

CONCLUSION.

Based on the foregoing, the decision of the Court of Appeals affirming the judgment of the district court should be affirmed.

Dated: October, 1982.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The statutes involved in this case are:

A. § 8(f) of the National Labor Relations Act, 73 Stat. 545, 29 U.S.C.A. § 158(f):

> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection,

shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

B. § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

C. § 302(c)(5) of the Labor Management Relations Act of 1947, 61 Stat. 157-158, 29 U.S.C.A. § 186(c)(5):

"(a) It shall be unlawful for any employer to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or

hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

D. § 515 of the Employee Retirement Income Security Act of 1974, as added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295, 29 U.S.C.A. § 1145:

"Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."